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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. 918

PARTENWEEDEREI, MS BELGRANO, and
RUDOLPH A. OETKER,
Petitioners,

vs.

BRADY-HAMILTON STEVEDORE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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Respondent's Brief charges petitioners with misleading statements and contains other inaccuracies which should not stand unchallenged.

The reference to respondent's negligence as the cause of injury was not an erroneous assumption, as respondent

charges. The District Court's findings as to respondent's negligence and causation have never been overturned nor even reviewed by the Court of Appeals.

The curious claim that petitioners did not ask the Court of Appeals to remand to the District Court, but merely suggested this possibility, is refuted on the very page of the record cited by respondent (Tr. 627) where petitioners requested that the court "either, (1) decide shipowners' claim upon the merits, or (2) remand to the District Court for further proceedings on the claim of indemnity for expenses of defense."

We doubt the relevance of the mere number of past papers and proceedings in the case but, assuming relevance, respondent should be accurate and state (1) that in the Court of Appeals there were not three, but two, hearings, the main hearing on liability, and the rehearing at which indemnity for expenses of defense was argued, before the court determined not to decide it; and (2) that the present petition for certiorari is not the third, but the second, in this litigation and the first arising from issues between the present parties.[1] If respondent's recital of past proceedings is significant, it is only to emphasize that there is no excuse for a refusal of the Court of Appeals either to decide all the issues or permit them to be decided by the District Court.

The recital of possible future proceedings is likewise irrelevant. The propriety of the writ is surely not dependent upon the possibility that, if indemnity is allowed to

[1]The first petition for certiorari was Weigel's petition for review of the liability claim.

be decided on the merits, respondent might seek further appellate proceedings. We would expect that, on remand, the District Court would give great weight to such authorities as the *Restatement of Contracts*, § 334; *Paliaga v. Luckenbach Steamship Co.*, 301 F.2d 403, 1962 A.M.C. 1632 (2d Cir.); *Rederi A/B Dalen v. Maher*, 303 F.2d 565, 1962 A.M.C. 1944 (4th Cir.) and *B & G. Electric Co. v. G. E. Bass & Co.*, 252 F.2d 698 (5th Cir. 1958) and confirm petitioners' right to the award of fees and expenses they had already won.[2] If an appeal followed, there is no reason to assume that the Court of Appeals would not concur with such authorities and leave no conflict for this Court to resolve.

Although not asserting any legal prejudice to itself, respondent complains that petitioners did not spell out in precise detail the proper mandate for the Court of Appeals on the indemnity decree, prior to the time when the Court of Appeals, without review, deprived petitioners of their judgment for fees and expenses. Surely petitioners might rely, to some extent, on the Court's knowledge of orderly procedure in the disposition of related issues. The elements of petitioners' right to their judgment for fees and costs have been presented to both the District Court and the Court of Appeals. Respondent's appeal presented no challenge to any part of the judgment, ex-

[2]The present decision of the Court of Appeals in this case has produced a result in conflict with the second, fourth and fifth circuits, in the cases cited in the text, but, because of the narrow ground on which the Court of Appeals here chose to rest its result, we have considered it appropriate to rely mainly upon the disorderly procedure, rather than on the conflict between circuits, as a ground for certiorari.

cept upon the question of stevedore fault as the cause of petitioners' loss. Not only the Civil Rules[3] but traditional admiralty practice[4] called for the Court of Appeals to do complete justice and "grant the relief to which [petitioner] is entitled," or else remand to the District Court for this purpose. In conflict with the Court of Appeals for the Second Circuit in *Paliaga v. Luckenbach Steamship Co., supra*, the Court of Appeals completely ignored Rule 54(c), F.R.C.P.

Respondent puts forward no law to the contrary and presents no matter calling for argument in this Court. The cause is an appropriate one for the grant of certiorari and summary modification of the judgment of the Court of Appeals to provide for remand to the District Court.

Dated, April 12, 1963.

Respectfully submitted,

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[3]Rule 54 (c), F.R.C.P. (". . . every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."), made applicable by Rule 8 of the Court of Appeals for the Ninth Circuit.

[4]See, e.g., *Reid v. Fargo*, 241 U.S. 544 (1916) and *Canadian Pacific Railway Co. v. United States*, 272 F.2d 913, 918, 1960 A.M.C. 323, 329 (9th Cir. 1959).